Atari, Inc. v. North American Philips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir. 1982), cert. denied, 459 U.S. 880 (1982); Johnson Controls, Inc. v. Phoenix Control Sys., Inc., 886 F.2d 1173, 1174 (9th Cir. 1989)); see also National Football League v. McBee & Bruno's, Inc., 792 F.2d 726, 729 (8th Cir. 1986) ("Copyright law has long held that irreparable injury is presumed when the exclusive rights of the holder are infringed")[20]; 3 Nimmer ¶ 14.06[A], at 14-100 ("[i]t is the prevailing view that a showing of a prima facie case of copyright infringement, or reasonable likelihood of success on the merits, raises a presumption of irreparable harm.") (quotation omitted).[21]

Courts apply this presumption because of the unique nature of intellectual property and the difficulty of calculating damages after the fact.

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[20] The lone differing view comes from the Fifth Circuit, which has suggested that a plaintiff must make some independent showing of irreparable harm in copyright cases to obtain a preliminary injunction. See Plains Cotton Coop. Ass'n v. Goodpasture Computer Serv., Inc., 807 F.2d 1256, 1261 (5th Cir.), cert. denied, 484 U.S. 821 (1987). Plains Cotton is not binding on this Court because it was decided after the Eleventh Circuit split from the Fifth Circuit. In addition, Plains Cotton does not set forth any reason for departing from the unanimous views of the other Courts of Appeals that have considered the question.

[21] A similar presumption of irreparable injury applies to infringement of other forms of intellectual property, such as trademarks, see, e.g., Helene Curtis Indus. v. Church & Dwight Co., 560 F.2d 1325, 1332 (7th Cir. 1977); Rubber Specialty, Inc. v. Sneaker Circus, Inc., 195 U.S.P.Q. 798, 802 (S.D. Fla. 1977), and patents, Smith Int'l v. Hughes Tool Co., 718 F.2d 1573, 1581 (Fed. Cir. 1983) (irreparable injury presumed where validity and infringement are clearly established), cert. denied, 464 U.S. 996 (1983); Southwest Aerospace Corp. v. Teledyne Indus., 702 F. Supp. 870, 886 (N.D. Ala. 1988) (similar), aff'd mem., 884 F.2d 1398 (Fed. Cir. 1989); see also Time Warner Cable v. Freedom Electronics, Inc., 897 F. Supp. 1454, 1460 (S.D. Fla. 1995) (sale of devices used to steal cable service) ("several courts have held that [the] absence of justification for violation of clear statutory rights virtually eliminates the necessity of showing irreparable harm").

Country Kids 'N City Slicks, 77 F.3d at 1288 (presumption is grounded in the fact that "the financial impact of copyright infringement is hard to measure and often involves intangible qualities such as customer goodwill"); Metro-Goldwyn-Mayer, Inc. v. American Honda Motor Co., Inc., 900 F. Supp. 1287, 1301 (C.D. Cal. 1995) ("Irreparable injury is presumed because the copyright owner's right to exploit its work is unique"); see Rubber Specialty, 195 U.S.P.Q. at 802 (S.D. Fla. 1977) ("the Courts of this circuit subscribe to the rule that infringement of a trademark is, by its very nature, an activity which causes irreparable harm -- irreparable in the sense that no final decree of a court can adequately compensate a plaintiff for the confusion that has already occurred"). The presumption applies whether the copyright owner is a small company or a large national entity such as the plaintiffs in Hasbro Bradley, Apple Computer, Atari, Inc., Johnson Controls, Inc., National Football League v. McBee & Bruno's, Inc., and Microsoft Corp. v. Harmony Computers & Electronics, Inc., 846 F. Supp. 208, 211 (E.D.N.Y. 1994).

District courts within the Eleventh Circuit, including the Southern District of Florida, have embraced the presumption in copyright cases. See e.g., Savannah Forestry Equip., Inc. v. Savannah Equip., Inc., 25 U.S.P.Q.2d 1378, 1380 (S.D. Ga. 1992); Georgia Television Co. v. TV News Clips of Atlanta, Inc., 718 F. Supp. 939, 948 (N.D. Ga. 1989); Universal City Studios,

Inc. v. Casey & Casey, Inc., 622 F. Supp. 201, 204 (S.D. Fla. 1985), aff'd mem., 792 F.2d 1125 (11th Cir. 1986); see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hagerty, 808 F. Supp. 1555, 1558-60 (S.D. Fla. 1992) (Nesbitt, J.) (applying statutory presumption of irreparable injury in breach of noncompetition agreement case), aff'd, 2 F.3d 405 (11th Cir. 1993). The presumption of irreparable injury is particularly appropriate here because PrimeTime 24's infringement is of a commercial nature. See Georgia Television, 718 F. Supp. at 949; Savannah Forestry, 25 U.S.P.Q.2d at 1381; see also Pacific & S. Co. v. Duncan, 744 F.2d 1490, 1497 (11th Cir. 1984) ("a commercial use naturally produces harmful effects"), cert. denied, 471 U.S. 1004 (1985).

Under this great weight of authority, the Court holds that plaintiffs are entitled to a presumption of irreparable injury. Moreover, as discussed below, plaintiffs have also established irreparable injury through extensive record evidence.

2. Evidence of irreparable injury. Plaintiffs presented extensive, credible evidence of at least three ways in which PrimeTime 24's infringements are causing irreparable injury. First, plaintiffs presented evidence of difficult-to-quantify losses of advertising revenues by both the network plaintiffs and individual local stations. Second, plaintiffs provided

evidence of equally difficult-to-quantify losses of goodwill. Third, plaintiffs offered evidence that it is unlikely that PrimeTime 24 will be able to satisfy a substantial monetary judgment at the end of the case.

a. Losses of advertising revenue by networks and stations.

i. Station losses of advertising revenue during network programs. Network stations derive most of their revenue from selling advertising time. 6/2/97 Tr. at 51 (Farr). Network stations sell advertising during all three of the categories of programming they offer: network programs (such as "The CBS Evening News" and "The Simpsons"), local programs (such as the "6 O'Clock News" or "Sports Sunday"), and syndicated programs (such as "Hard Copy" or "Entertainment Tonight"). Id. at 49-51. During network programs, individual stations sell advertising time during time slots called "local avails." Id. at 51-52. For both stations owned by the network and affiliate stations, the sale of advertising during network programs accounts for as much as half of total station revenue. Id. at 52-53.

Because advertising rates for television commercials are based on the number of viewers that will be reached by the advertising, id. at 68, a station will not be able to charge as much for advertising time if local viewers are watching network programming delivered by satellite. Id. at 68-69, 75-76, 80-82, (Farr); 6/2/97 Tr. at 152 (Schmidt). A loss of 2,000 viewers is "hugely

significant" in a small market, 6/2/97 Tr. at 102 (Farr), and losses of several thousand viewers cause significant revenue losses in markets of any size. Id. at 68-69, [89-91.]

Because PrimeTime 24 is likely to continue to add subscribers at a rate of one million per year if a preliminary injunction is not entered, its infringements are likely to cause substantial revenue losses to many, if not all, network stations. However, because of problems in reconstructing precisely what would have happened in the absence of PrimeTime 24's infringements, it is difficult to quantify the precise losses that stations will incur. 6/2/97 Tr. at 69 (Farr); 6/2/97 Tr. at 154-55 (Schmidt); see Time Warner Cable v. Freedom Electronics, Inc., 897 F. Supp. 1454, 1458 (S.D. Fla. 1995) (plaintiff "cannot practicably determine the number of lost subscribers and lost revenues resulting from the defendants' unlawful conduct").

ii. Network and station losses of advertising revenues because of loss of "lead-in" and "lead-out" audiences and lack of exposure to promotional spots. "Audience flow," a recognized and important phenomenon in television viewing, refers to viewers staying tuned to the same channel from one program to the next. 6/2/97 Tr. at 57 (Farr). Both networks and individual network stations design their programming schedules, and the promotional spots that appear during their programs, to encourage maximum

audience flow. Id. at 56-58. For example, the size of the audience for the "CBS Evening News with Dan Rather" is largely determined by the size of the audience for the local news programs that immediately precede it. Id. at 57. The pool of viewers who stay tuned to the same channel after watching a particular program is referred to as the "lead-in audience." Id. at 56-57.

By delivering network programming from a distant source -- without local news or other market-by-market customization -- PrimeTime 24 disrupts the efforts of networks and stations to package their copyrighted programming in a manner designed to encourage maximum audience flow. Id. at 67, 70-71, 73-74. For example, a viewer in Miami who watches "Chicago Hope" from 10 to 11 p.m. on WRAL through PrimeTime 24 is unlikely to stay tuned for the local news from Raleigh, North Carolina, and may then be lost to CBS for the David Letterman show at 11:30. Id. at 73.

Networks also cooperate with their local stations in promoting one another's programming. 6/2/97 Tr. at 55-56, 58 (Farr). For example, CBS provides local stations with time for a "local news tease" at 10:59 p.m. to promote the station's upcoming 11 p.m. news program. Id. at 56. Viewers who watch network programming via PrimeTime 24 are not exposed to promotional spots featuring programming from their own local stations, and, therefore, are less likely to watch their own station's local programming. Id. at

70-71; June 2, 1997 Tr. at 155 (Schmidt) (discussing promotion of recent series by WISH in Indianapolis about investigation of local mental hospitals).

By decreasing the size of audiences for network and/or local station programming in these ways, PrimeTime 24 reduces the revenues both of the networks and of local stations (including stations owned by the networks). As with the other sources of lost advertising revenues discussed above, however, the revenue losses that result from the loss of lead-in audiences, and from lack of exposure to promotional spots, are difficult to quantify. 6/2/97 Tr. at [99-100] (Farr); 6/2/97 Tr. at 154-55 (Schmidt).[22/]

b. Irreparable losses of goodwill by networks and stations. Plaintiffs also presented substantial, credible evidence that both CBS and Fox and individual CBS stations suffer losses of goodwill as a result of PrimeTime 24's infringements. It is settled law that such losses are irreparable. Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1449 (11th Cir. 1991) ("the loss

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[22/] There is a second-order effect as well: the revenue losses discussed above are likely to impair the ability of stations to make the expenditures necessary to create high quality local news programs and to acquire desirable syndicated programming. Id., Tr. at 54 (Farr). If the attractiveness of a station's local and syndicated programming is reduced, it is likely to lose viewers and, therefore, suffer additional revenue losses. See Time Warner Cable v. Freedom Electronics, Inc., 897 F. Supp. at 1458 (S.D. Fla. 1995) ("In addition to diminishing [plaintiff's] revenues, the defendants' unlawful conduct injures [plaintiff's] . . . ability to attract and finance the future acquisition of quality services, and further impairs its ability to enhance its future growth and profitability."). Again, these effects are virtually impossible to quantify with precision.

of customers and goodwill is an 'irreparable' injury"); Time Warner Cable v. Freedom Elecs., Inc., 897 F. Supp. 1454, 1458 (same).

Although the Copyright Act does not permit PrimeTime 24 to deliver network programming to "served" households, subscribers in such households nevertheless may desire to subscribe to PrimeTime 24. Viewers who have become accustomed to having an additional source of network programming -- even one for which they are ineligible -- are often irritated and angry if that additional source is terminated. 6/2/97 Tr. at 71-72 (Farr); 6/2/97 Tr. at 152-53 (Schmidt); Birdwell Decl. ¶ 8; Burns Decl. ¶¶ 9-10 & Attach. A; Sullivan Decl. ¶¶ 9-10 & Attach. A; Thedwall Decl. ¶ 6 & Attach. A; Tucker Decl. ¶¶ 10-13 and Attach A. Many viewers vow "never to watch your station" (or "your network") again when this occurs. E.g., 6/2/97 Tr. at 71 (Farr); id. at 154 (Schmidt).

These angry reactions from local viewers cause substantial losses of goodwill to individual network stations, and also to television networks. If no preliminary injunction is entered, hundreds of thousands of additional unlawful subscribers would likely be signed up during the pendency of this litigation. Plaintiffs would then face a much larger pool of viewers whose service would need to be terminated at the end of the case, and a much larger (and

irreparable) loss of goodwill. Ferrero, 923 F.2d at 1449 (loss of goodwill is irreparable); Time Warner Cable, 897 F. Supp. at 1458 (same).

c. Likely inability of PrimeTime 24 to pay substantial monetary damages. Aside from the forms of irreparable injury discussed above, plaintiffs have also shown that they would be irreparably injured absent an injunction because it is unlikely that PrimeTime 24 would be able to pay a substantial monetary judgment at the end of the case. It is well settled that a defendant's likely inability to satisfy a damages award, by itself, can make a plaintiff's injury irreparable. DeMatte v. Brotherhood of Indus. Workers' Health and Welfare Fund, 1996 WL 588919 at *3 (M.D. Fla. 1996) (irreparable injury found when "there is a substantial risk that Plaintiff will be unable to recover benefits under the plan if the assets of the plan are not frozen"); see Federal Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 560 n.1 (5th Cir. 1987) ("The absence of an available remedy by which the movant can later recover monetary damages . . . may also be sufficient to show irreparable injury") (internal citations omitted).[23/]

When asked about PrimeTime 24's total assets, its CEO, Sid Amira, responded as follows: "Our assets are our two and a half million subscribers.

[23/] See also Airlines Reporting Corp. v. Barry, 825 F.2d 1220, 1227 (8th Cir. 1987) (upholding preliminary injunction when plaintiff "demonstrated a clear probability that defendants will not be able to satisfy an award of adequate damages").

We are a service organization. There is not a whole lot of assets." 6/4/97, Tr. at 148. Mr. Amira further testified that PrimeTime 24's principal financial asset is a reserve fund of a few million dollars set aside to pay statutorily-required copyright fees. Id. at 114-15, 148. By contrast, the statutory damages that the Copyright Act authorizes to be awarded against PrimeTime 24 are many tens of millions of dollars.[24/] Because PrimeTime 24 would not be able to satisfy a judgment of this magnitude, plaintiffs' injury would be irreparable.

3. PrimeTime 24's Arguments Against Irreparable Injury. PrimeTime 24 has not offered any detailed response to any of the points discussed above. Instead, PrimeTime 24 contends that other factors show a lack of irreparable injury. The Court discusses each of PrimeTime 24's principal arguments in turn.

a. Magnitude of PrimeTime 24's Infringements. PrimeTime 24 argues that the network plaintiffs (CBS and Fox) are not suffering irreparable injury because they are large, successful businesses and because PrimeTime 24's subscribers (although growing rapidly) currently amount to only a

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24/ Section 119(a)(5) authorizes substantial monetary penalties, including an award of up to $5/month for each ineligible subscriber. Even if PrimeTime 24 has only one million ineligible subscribers, its exposure is $5 million per month for infringement of CBS programming, and $5 million per month for Fox programming, for a total of $10 million per month.

relatively small percentage (approximately 2.5 percent) of the networks' overall viewership. The Court rejects that argument.

First, the Court does not view the unauthorized sale of copyrighted programming to one million or more ineligible subscribers as de minimis.

Second, many of the CBS affiliate stations that are members of the CBS Television Affiliates Association, and whose federal statutory rights PrimeTime 24 is violating, are smaller businesses than PrimeTime 24. See, e.g., Pl. Ex. 5 (listing market sizes of smaller market stations). Indeed, it is in some of these smaller markets that the effects of PrimeTime 24's infringements are the greatest. For example, PrimeTime 24 serves more than 11 percent of the total TV households in the Missoula, Montana market in which plaintiff KPAX Communications operates the CBS affiliate. Def. Ex. 50.

Third, and most important, to obtain a preliminary injunction, losses need only be irreparable, not immediately crippling. Indeed, the Eleventh Circuit has rejected as "specious" the precise argument made by PrimeTime 24: that "in deciding [whether irreparable injury exists], the court ought to compare the actual losses sustained to the size of the company." Ferrero v. Associated Materials Inc., 923 F.2d 1441, 1449 (11th Cir. 1991) , (citing Merrill Lynch, Pierce, Fenner & Smith v. Stidham, et al., 658 F.2d 1098, 1102

n.8 (5th Cir. Unit B 1981)); see J.E. Hanger, Inc. v. Scussel, 937 F. Supp. 1546, 1556 (M.D. Ala. 1996) ("the court rejects an issue raised during the hearing that any losses sustained by [plaintiff] are minimal compared to the overall size of [plaintiff]") (following Ferrero). In fact, courts routinely award preliminary injunctions sought by large, national copyright owners against small defendants over infringements much smaller in scale than PrimeTime 24's national violations.[25/]

b. Claimed Delays. PrimeTime 24 argues that plaintiffs' "delay" in filing suit shows a lack of irreparable injury. The Court disagrees. Plaintiffs filed suit only two days after the final settlement conference.[26/] Attempts to resolve matters out of court do not undercut requests for preliminary relief.

[25/] See, e.g., Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033 (1984) (preliminary injunction granted in favor of large computer company against small infringer); Walt Disney Productions v. Air Pirates, 581 F.2d 751, 753 (9th Cir. 1978) (district court had entered temporary restraining order and preliminary injunction requested by large motion picture studio against small infringer); Microsoft Corp. v. Harmony Computers & Electronics, Inc., 846 F.Supp. 208 (E.D.N.Y. 1994) (issuing preliminary injunction sought by Microsoft against small infringer of computer programs); National Football League v. Careless Navigator Lounge, Inc., No 94-6864 CIV-Moore (S.D. Fla. Sept. 14, 1994) (finding irreparable harm to NFL from infrigements by local tavern and issuing preliminary injunction); Universal City Studios, Inc. v. Lollypop Trading, 1993 WL 328848 (S.D.N.Y. Aug. 24, 1993) (issuing preliminary injunction to producers of "Jurassic Park" against small T-shirt vendors); Twentieth Century Fox Film Corp. v. Mow Trading Corp., 749 F. Supp. 473 (S.D.N.Y. 1990) (issuing preliminary injunction to producers of "The Simpsons" against small T-shirt manufacturer).

[26/] Broadcasters and satellite carriers had been negotiating about compliance with Section 119 for approximately two years. Id., Tr. at 123. The timing of those negotiations corresponds to the period (beginning in 1994) during which the emergence of small, inexpensive satellite dishes made PrimeTime 24's infringements much more significant.

See, e.g., American Direct Mktg., Inc. v. Azad Int'l, Inc., 783 F. Supp. 84, 91 (E.D.N.Y. 1992); Clifford Ross Co. v. Nelvana, Ltd., 710 F. Supp. 517, 521 (S.D.N.Y.), aff'd mem., 883 F.2d 1022 (2d Cir. 1989); New Boston Television, Inc. v. ESPN, 215 U.S.P.Q. 755, 758 (D. Mass. 1981). To the contrary, "attempts to reach an out of court compromise . . . should be commended rather than condemned." Encyclopedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243, 252 (W.D.N.Y. 1978) (emphasis added).

PrimeTime 24 also contends that plaintiffs' "delay" in filing the present motion shows a lack of irreparable injury. However, plaintiffs filed the motion, including detailed maps for more than 40 CBS and Fox stations nationwide, within three weeks of obtaining subscriber data in the electronic form needed to create the maps. PrimeTime 24 itself declined to produce national subscriber data in discovery; as a result, plaintiffs had to obtain subscriber information through subpoenas to PrimeTime 24 distributors such as DirecTV. Accordingly, the Court rejects defendants' argument that the time required to prepare the present motion shows a lack of irreparable injury.[27/]

[27/] In addition, with regard to both claims of delay, PrimeTime 24 does not allege any prejudice resulting from the alleged delay, as would be required to defeat a preliminary injunction motion. See Georgia Television Co. v. TV News Clips, Inc., 718 F. Supp. 939, 949 (N.D. Ga. 1989). Nor could it do so as to an injunction against signing up new illegal subscribers, which is what the present motion seeks.

c. Asserted lack of network interest in protecting stations from infringements by PrimeTime 24. PrimeTime 24 asserts that the only interest of CBS and Fox is in ensuring that the maximum number of viewers receive network programming and that PrimeTime 24's delivery of CBS and Fox programming to ineligible subscribers is consistent with that objective. This assertion is not supported by the record. As discussed above, television networks have a strong interest in ensuring that viewers see network programming through their local network station rather than by satellite from a distant location.[28/]

d. PrimeTime 24's Non-Delivery of Local News. PrimeTime 24 argues that network stations are not injured because PrimeTime 24 "does not provide local programming in competition with the affiliates; it instead provides distant network signals." That argument misses the point. As discussed above, to the extent viewers watch network programs by satellite from PrimeTime 24, the local station is less able to sell advertising on those programs -- and thereby loses revenue that could be used to support the station and its local programming.

[28/] Moreover, CBS itself owns and operates many stations that are themselves suffering substantial losses from PrimeTime 24's infringements.

e. The Ability of Viewers to Switch Back to Their Local Station for Local News. PrimeTime 24's CEO, Mr. Amira, testified that PrimeTime 24's subscribers may switch back to their local stations from PrimeTime 24 to watch local news, 6/4/97 Tr. at 110-11, which might reduce the impact on the local station. That contention, of course, is completely inconsistent with PrimeTime 24's position that it serves only viewers who cannot receive their local stations over the air. In any event, even if PrimeTime 24's customers switched back to their local stations for local news, it would not solve the problem: the local station would still lose revenues from local advertisements during network programs, would still be impaired in its ability to sell advertising during syndicated programs, and would still lose the lead-in audiences and promotional benefits that are an important part of the network/affiliate partnership.

C. The Remaining Factors Also Favor Plaintiffs.

1. Balance of Harms. PrimeTime 24 argues that the proposed injunction requiring it to comply with the "unserved household" limitation should not issue because it would have "a devastating effect" on PrimeTime 24's business. The Court rejects this argument.

First, PrimeTime 24's CEO, Mr. Amira, testified that the statement in his declaration that an injunction would put PrimeTime 24 out of business was

"pure conjecture on my part." 6/4/97 Tr. at 148. Because the proposed preliminary injunction would not affect the more than two million subscribers that PrimeTime 24 signed up before the filing of plaintiffs' motion on March 11, 1997, Mr. Amira's conjecture is not supported by the record.

Second, Mr. Amira testified that PrimeTime 24 has hit a contractual cap on payments from its largest (by far) distributor, and therefore no longer receives any payments from DirecTV for additional customers. 6/4/97 Tr. at 167-68. As a result, PrimeTime 24's revenue stream from its largest distributor would be unaffected by the proposed injunction.

Third, and most important, whatever the effect of an injunction on PrimeTime 24, a company cannot build a business based on infringements and then argue that its unlawful business will be disrupted if it has to comply with the law. Courts have uniformly rejected this "devastating effect" argument by copyright infringers. See Georgia Television, 718 F. Supp. at 949 ("[c]opyright law . . . dictates that [injury from being required to obey the Copyright Act] merits little equitable consideration and is insufficient to outweigh the continued wrongful infringement of [plaintiffs'] asserted legal rights."); Concrete Machinery Co., 843 F.2d at 612 ("It would be incongruous to hold that the more an enterprise relies on infringement for survival, the more likely it will be able to defeat the copyright owner's efforts to have that

activity immediately halted."); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d at 1255 (rejecting "devastating effect" argument because it would permit knowing infringer "to construct its business around infringement"); Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 620 (7th Cir.) ("Advantages built upon . . . deliberate[] [infringement] do not seem to us to give the borrower any standing to complain that his vested interests will be disturbed") (quoting My-T Fine Corp. v. Samuels, 69 F.2d 76, 78 (2d Cir. 1934), cert. denied, 459 U.S. 880 (1982).

2. The Public Interest. A long line of cases holds that the public interest lies with protecting the rights of copyright owners against infringements. E.g., Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1255 (3d Cir. 1983) (citation omitted), cert. dismissed, 464 U.S. 1033 (1984); Georgia Television, 718 F. Supp. at 950. The Court finds that principle to be equally applicable to this case.

PrimeTime 24 makes a variety of contrary arguments. First, PrimeTime 24 asserts (Opp. at 19-20) that an injunction is not in the public interest because it is satisfying a public demand for a product. But, as the Supreme Court has recognized, "[a]ny copyright infringer may claim to benefit the public by increasing access to the copyrighted work." Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 569 (1985). Here, the record

reflects many reasons other than being an "unserved household" for a subscriber's decision to obtain PrimeTime 24, including time-shifting, additional sports programs, and the ability to watch network programs without putting up an antenna or subscribing to cable. Accordingly, the fact that ineligible subscribers are willing to pay for PrimeTime 24 has no bearing on the public interest calculation.

PrimeTime 24 also observes that Congress and the Copyright Office are currently reviewing the cable and satellite compulsory licenses and argues that this Court should therefore stay its hand. PrimeTime 24 has not provided the Court with any precedent for this novel argument, and the Court is aware of none. Congress frequently considers changes in many statutes. But the Court's task is to apply the law as Congress has enacted it. It is not for this Court to speculate about what changes Congress may (or may not) make in the future, or to apply a statute that Congress has not yet enacted.

Although this case raises significant public interest considerations, Congress has already balanced those considerations in enacting Section 119 and limiting PrimeTime 24's sales to "unserved households." As the legislative history of Section 119 reflects, Congress sought to balance the desire to make network programming available to the small number of homes beyond the reach of local stations with the need to "protect[] the existing

network/affiliate distribution system." 1988 House Report, supra, at 8; see id. at 14, 15, 19-20.[29/] To achieve that balance, Congress chose an objective standard, "Grade B intensity," that the FCC has long used as a proxy for picture quality. It is not for this Court to alter the balance that Congress has struck in seeking to advance the public interest.

In accordance with the above and foregoing, it is hereby

RECOMMENDED that Plaintiffs' Motion for Preliminary Injunction be **GRANTED**. Although Federal Rule of Civil Procedure 65(c) contemplates the issuance of a bond upon the entry of a preliminary injunction, a trial court "may elect to require no security at all." Corrigan Dispatch Co. v. Casa Guzman, S.P., 569 F.2d 300, 303 (5th Cir. 1978) (citations omitted). In light of plaintiffs' high likelihood of success, the Court exercises its discretion not to require the posting of a bond here.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Lenore C. Nesbitt, United States District Judge. Failure to file objections timely shall bar the parties from attacking on appeal the factual

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[29/] 134 Cong. Rec. 28584 (Oct. 5, 1988) (statement of Rep. Rinaldo) ("The provisions of H.R. 2848 will make it possible for our citizens who live in rural areas to greatly expand their news and entertainment sources to include the backbone of the broadcast TV system in the United States, the broadcast TV networks . . . This legislation . . . reasonably balances the rights of the copyright holders and the dish owners.").

findings contained herein. LoConte v. Dugger, 847 F.2d 745 (11th Cir. 1988), cert. denied, 488 U.S. 958 (1988); RTC v. Hallmark Builders, Inc., 996 F.2d 1144, 1149 (11th Cir. 1993).

RESPECTFULLY SUBMITTED at Miami, Florida, this 2 day of ~~June~~ July 1997.

LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Lenore C. Nesbitt
Counsel of Record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
SOUTHERN DIVISION

CBS INC.; FOX BROADCASTING CO.; GROUP W/CBS TELEVISION STATIONS PARTNERS; CBS TELEVISION AFFILIATES ASSOCIATION; POST-NEWSWEEK STATIONS FLORIDA, INC.; KPAX COMMUNICATIONS, INC.; LWWI BROADCASTING, INC.; AND RETLAW ENTERPRISES, INC., **Plaintiffs,** **vs.** **PRIMETIME 24 JOINT VENTURE,** **Defendant.**	**Case No. 96-3650-Civ-Nesbitt**

DEFENDANT PRIMETIME 24'S EMERGENCY MOTION TO STAY PRELIMINARY INJUNCTION PROCEEDINGS PENDING ACTION BY THE FEDERAL COMMUNICATIONS COMMISSION, WITH INCORPORATED MEMORANDUM OF LAW

Defendant PrimeTime 24 Joint Venture ("PrimeTime 24") hereby moves to stay the entry of any preliminary injunction order pending the outcome of an emergency rulemaking petition filed in the Federal Communications Commission last week by the National Rural Telecommunications Cooperative ("NRTC"). If that petition is allowed, plaintiffs' motion for a preliminary injunction may be substantially mooted.

On July 8, 1998, the NRTC filed an Emergency Petition for Rulemaking (the "Petition") with the Federal Communications Commission ("FCC"), urging the FCC to define for the first time "an

over-the-air signal of Grade B intensity" for purposes of the Satellite Home Viewer Act.[1] Attached as Exhibit 1 are copies of the NRTC's Petition along with a July 9, 1998 transmittal letter from NRTC Chief Executive Officer B.R. Phillips, III to FCC Chairman William E. Kennard. The NRTC Petition asks the FCC to initiate an immediate rulemaking proceeding to "prevent the massive disenfranchisement of millions of satellite consumers" that the NRTC fears will result from this Court's impending preliminary injunction order. The NRTC proposes that the FCC define a grade B signal for purposes of SHVA so that households would be "unserved" if they are located outside a geographic area in which 100 percent of the population is predicted to receive over the air coverage by a network affiliate 100 percent of the time, using readily available, affordable receiving equipment.

If the FCC adopts the NRTC's proposed rule or otherwise defines "an over-the-signal of Grade B intensity" for purposes of SHVA as something other than the median field strengths set forth in 47 C.F.R. §73.683(a), then the preliminary injunction motion may well be mooted. At a minimum, any preliminary injunction order would necessarily have to be modified to reflect a new standard, and the intricate compliance systems contemplated by plaintiffs' proposed order would have to be changed. Upwards of a million subscribers that may have to be terminated as a result of the retroactive nature of plaintiffs' proposed preliminary injunction order might then become eligible for network service. In the meantime, as the NRTC Petition states, "[m]assive court-ordered disconnections will be hugely disruptive to consumers."

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[1] The NRTC is an independent, non-profit cooperative association comprised of 550 rural electric cooperatives, 279 rural telephone systems and several non-member affiliate associations located throughout 48 states. PrimeTime 24 and its attorneys had no knowledge of the NRTC petition before it was filed.

To prevent the possibility of this needless disruption, this Court should stay the imposition of any preliminary injunctive relief pending action by the FCC. In the alternative, this Court should defer imposing any retroactive relief until the FCC has an opportunity to rule on the NRTC's Petition. In all events, this Court should take the positions set forth in the NRTC Petition into account in connection with the various pending motions pertaining to the proposed preliminary injunction.

WHEREFORE, PrimeTime 24's Emergency Motion to Stay Preliminary Injunction Proceedings Pending Action by the Federal Communications Commission should be allowed.

Dated: July 13, 1998

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing (with attached exhibit) was served on July 13, 1998 on the counsel of record listed below.

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Via Hand Delivery

The Honorable William E. Kennard
Chairman
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

Re: NRTC Emergency Petition for Rulemaking/SHVA

Dear Chairman Kennard:

Yesterday the National Rural Telecommunications Cooperative (NRTC) filed an "Emergency Petition for Rulemaking" urging the FCC to define an over-the-air signal of Grade B intensity for purposes of the Satellite Home View Act (SHVA). We are asking for the Commission's immediate attention to this issue because millions of rural consumers will likely be cut-off from network satellite service within days as a result of a Florida District Court's interpretation of the "Grade B" restrictions contained in the SHVA. A copy of our Petition was provided to your office.

Several months ago, I visited with you to discuss issues of concern to NRTC as a distributor of cable and broadcast programming to nearly 900,000 rural households via DBS and C-Band satellite technologies. We discussed the Grade B issue at that time, and I sensed that you and your fellow Commissioners were concerned about the effect of the Court's interpretation of the SHVA as a copyright matter on the Commission's ability to establish national telecommunications policy. We believe the FCC should not allow the District Court to usurp its authority in this area.

We hope to work with you and our Congressional representatives, who share our concern regarding the huge consumer impact of the District Court Order, to correct this problem before it happens. We urge the Commission to intervene in the District Court case, if possible at this point, or to take whatever other action is necessary to delay the issuance of an Injunction in that proceeding until the Commission has had an opportunity to rule on NRTC's Emergency Petition.

Exhibit 1